In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 366

IRVING POTASH, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari asks the Court to review a civil case pending on appeal in the Court of Appeals for the District of Columbia Circuit prior to rendition of judgment by that court, as authorized by 28 U. S. C. 1254 (1). Respondents oppose the granting of the petition on the ground that this is not a case warranting such "extraordinary" action (*Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; cf. *United States* v. *Mine Workers,* 330 U. S. 258, 269; *Ex parte Quirin,* 317 U. S. 1, 19–20).

860673—49

This proceeding arose with the filing by petitioner and others in the District Court for the District of Columbia, on March 22, 1948, of a petition for a declaratory judgment declaring that deportation proceedings are required to be conducted in accordance with the provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, *et seq.*, and for an injunction restraining respondents and their subordinates from proceeding with deportation proceedings, previously instituted against the complainants, otherwise than in accordance with the provisions of that Act (R. 22–27). On May 7, 1948, the District Court (Goldsborough, D. J.) issued a preliminary injunction as prayed in the petition (R. 39–41), and on February 17, 1949, a permanent injunction was issued (R. 44–45). Respondents appealed from this order to the Court of Appeals for the District of Columbia Circuit (R. 46), where the appeal is now pending.

The issue presented by the instant petition for certiorari is, as recognized by petitioner (Pet. 11, 18), the same as that presented in No. 154, *Wong Yang Sung, Petitioner* v. *J. Howard McGrath, Attorney General of the United States, and Watson B. Miller, United States Commissioner of Immigration and Naturalization Service,* now pending on writ of certiorari to the Court of Appeals for the District of Columbia Circuit, i. e., whether deportation proceedings are governed by

the Administrative Procedure Act.[1] The decision of this Court in the *Wong Yang Sung* case will thus be dispositive of the issue raised by the instant petition. It is true that an early determination of the question by this Court is desirable, as urged by petitioner (Pet. 11) and as we stated in our memorandum concurring in the petition for certiorari in the *Wong Yang Sung* case. But since the issue is already before the Court in the latter case, decision of this question will not be further expedited by the granting of certiorari in the present case before judgment of the Court of Appeals, as requested by petitioner. Petitioner is not in custody in connection with the deportation proceedings, and he advances no sound reason why the normal processes of appellate review should not be adhered to in his case. Petitioner urges that the decision below in this case rested upon Section 5 of the Administrative Procedure Act, while the decision below in the *Wong Yang Sung* case is based upon Section 7. The Government expects to contend that both sections support the decision below in

[1] This is also the issue presented in No. 213, *United States of America ex rel. Lee Wo Shing, Petitioner* v. *Edward J. Shaughnessy, Acting District Director of the Immigration and Naturalization Service in the New York District, etc.*, now pending on petition for a writ of certiorari to the Court of Appeals for the Second Circuit. In the latter case, we filed a memorandum suggesting that the Court enter an appropriate order in the light of the decision to be reached in the *Wong Yang Sung* case.

the latter case, thereby presenting the entire problem to this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949